LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 29 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. ~~74~~ 74-1234

UNITED STATES OF AMERICA

v.

MANUEL GLENN ABASCAL

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

HOWARD MOORE, JR.
COLE A. POWELL
1880 San Pedro
Berkeley, California 94707
(415) 527-7656

Attorneys for Petitioner

PRINTER/TYPOGRAPHY • CAPTAIN COPY, 2908 GROOMING WAY, BERKELEY, CA.

INDEX

Page

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Constitutional Provisions Involved 3
Statutory and Rule Provisions Involved 3
Statement of the Case 4
Reasons for Granting the Writ 7

I. It Is Important For This Court To Firmly Establish That The Trial Judge's Total Failure To Warn Petitioner That Petitioner's Peaceful And Respectful Conduct Would Be Punished Criminally Deprived Petitioner Due Process Of Law In Violation Of The Fifth Amendment, United States Constitution 7

II. It Is Important For This Court To Firmly Establish, By Reversing The Judgment Below, That The Exercise Of The Summary Contempt Power Is Only Appropriate When There Is An Actual And Material Obstruction Of Justice, And Not Merely An Affront To The Trial Judge's Sensibilities 12

A. No Actual And Material Obstruction Of The Administration Of Justice Occurred 12

B. The Record Shows That Petitioner's Failure To Step Forward Was For A Meritorious Reason And Other Less Drastic Remedies Were Available Which Made Summary Contempt Inappropriate 16

INDEX

C. The Contempt Adjudication Results From An Apparent Confusion Of The Sensibilities Of The Trial Judge With An Obstruction Of Justice 17

D. Certiorari Should Be Granted To Resolve Conflicts Between The Circuits As To Whether A Failure To Obey A Court Order Which Does Not Result In An Actual And Material Obstruction Of The Administration Of Justice May Be Punished As A Summary Contempt..... 19

III The Supervisory Power Of This Court Should Be Exercised To Correct The Decision Of The Ninth Circuit Which Upholds Petitioner's Conviction Even Though That Court Ruled That Petitioner Was Improperly Proceeded Against Under Ruie 42(a), FRCrP, Where The Conviction Depends Upon The Correctness Of The Trial Judge's Characterization Of Petitioner's Courtroom Posture 22

Conclusion 23

Certificate Of Contempt A1

Opinion Of The Court Of Appeals A4

Order Denying Petition For Rehearing .. A14

Order Staying Mandate A15

CITATIONS

Cases	Pages
Anderson v. Dunn, 6 Wheat. 204, (1821)	16
Appeal of the United States Securities and Exchange Commission, 226 F.2d 501 (6 Cir., 1955)	n1, 8
Bitter v. United States, 389 U.S. 159 (1967)	5,9
Bloom v. Illinois, 391 U.S. 194 (1958)	7
Brown v. United States, 365 U.S. 148 (1958)	n1, 8, 17
Comstock v. United States, 419 F2d 1128 (9th Cir., 1969)	21
Connally v. Gen. Const. Co., 269 U.S. 385 (1926)	10
Cooper v. Superior Court, 55 C. 2d 291 (1961)	20
Craig v. Harney, 331 U.S. 367 (1942)	17, 18
Dashbach v. United States, 254 F.2d 687 (9th Cir., 1958)	12
Dellinger v. United States, 502 F.2d 813 (1974)	19
Ex Parte Hudgings, 249 U.S. 378 (1919)	13, 14, 15
Farese v. United States, 209 F. 2d 312 (1st Cir., 1954)	9
Gallagher v. Municipal Court, 31 C. 2d 784 (1948)	11
Gooding v. Wilson, 405 U.S. 518 (1972)	10
Green v. United States, 356 U.S. 165 (1958)	n2, 10, n4, 17
Illinois v. Allen, 397 U.S. 337 (1971)	9
In re Atterbury, 316 F.2d 106 (6th Cir, 1963)	n1
In re Chase, 468 F.2d 128 (7th Cir., 1972)	21

CITATIONS

In re Dellinger, 461 F.2d 389 (7th Cir., 1972) aff'd after remand, sub. nom., Dellinger v. United States, 502 F.2d 813, cert. pend., No. 74-714 19

In re Little, 404 U.S. 553 (1972) 21

In re McConnell, 370 U.S. 230 (1962) 13, 15

In re Michael, 326 U.S. 224 (1945) 13, 15

In re Nieback, 476 F.2d 930 (D.C. Cir., 1973) n5, 21

Johnson v. United States, 344 F.2d 401 (5th Cir., 1965) n1, 8

Maness v. Meyers, 43 USLW 4143, No. 73-689 (1/15/75) 16

Mayberry v. Pennsylvania, 400 U.S. 453 (1971) 7

Offutt v. United States, 348 U.S. 11 (1954) n1, 8, 17

Sacher v. United States, 343 U.S. 1 (1954) n1, 8

Shibley v. United States, 236 F.2d 234 (9th Cir., 1956) n1, 8

Shillitani v. United States, 384 U.S. 364 (1966) 16

Taylor v. Hayes, ... U.S. ..... 94 S.Ct. 2697 ..... 8, 23

United States v. Belahanty, 488 F.2d 396 (6th Cir., 1973) n5, 21

United States v. Bollenbach, 125 F.2d 458 (2nd Cir., 1942) n1, 8

United States v. Dennis, 183 F.2d 201 (2d Cir., 1950) n1, 8

CITATIONS

United States v. Green, 176 F.2d 169
(2d Cir., 1948) cert. den. 338 U.S. 851 (1949) n1, 8

United States v. Mara, 482 F.2d 1196 (2nd Cir., 1973) n5,21

United States v. Meyer, 462 F.2d 827
(D.C. Cir., 1972) n5, 21

United States v. Piccolo, 395 F. Supp. 955
(D.C. Conn., 1967) n1, 8

United States v. Riniera, 308 F.2d 24
(2d Cir., 1962), cert. den., 371 U.S. 935 (1962)..... n1, 8

United States ex rel Robson v. Malone, 412 F.2d 848
(7th Cir., 1969) 21

United States ex rel Robson v. Oliver, 470 F.2d 11
(7th Cir., 1974) n5, 21

United States v. Schieffer, 351 F.2d 91
(6th Cir., 1965) n5, 21

United States v. Seale, 461 F.2d 345 (7th Cir., 1972) n5,21

United States v. Seavers, 472 F.2d 607
(6th Cir., 1973) n5, 21

United States v. Snider, 502 F.2d 645
(4th Cir., 1974) n5, 21

United States v. Sternman, 415 F.2d 1165
(6th Cir., 1969) n1, 8

United States v. Wilson, No. 73-1162,
43 USLW 3371 (Jan. 1975) n6, 21

Wong Gim Ying v. United States, 231 F.2d 776
(D.C. Cir., 1956) n1, 8

Yates v. United States, 227 F.2d 848
(9th Cir., 1955) 12

CITATIONS

Constitutional Provisions

United States Constitution:
Fifth Amendment ..... passim

Statutes

18 United States Code, Section 401 (1) ..... passim
21 United States Code, Section 841 4
21 United States Code, Section 846 4
21 United States Code Section 952 4
21 United States Code Section 960 4
28 United States Code, Section 963 4
California Code of Civil Procedure,
Section 1211 11

Rules

Rule 42(a), Federal Rules of
Criminal Procedure ..... passim
Rule 42(b), Federal Rules of
Criminal Procedure ..... passim

Other Authorities

Burger, "The Necessity for Civility", 52 F.R.D. 211.... 21

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. . . . . .

UNITED STATES OF AMERICA,
Respondent-Appellee.

v.

MANUEL GLENN ABASCAL,
Petitioner-Appellant.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

The petitioner Manuel Glenn Abascal respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on January 9, 1975, rehearing of which was denied on February 27, 1975.

OPINIONS BELOW

Certificate of Contempt, pursuant to Rule 42(a), appears as Appendix A attached hereto. The opinion of the United States Court of Appeals for the Ninth Circuit, affirming,

appears as Appendix B. A copy of the order denying the petition for a rehearing entered herein on February 27, 1975 appears as Appendix C. All of the foregoing are as yet unreported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 9, 1975. A timely petition for rehearing was filed and was denied on February 27, 1975. The mandate of the Ninth Circuit has been stayed by that Court, see Appendix D attached, pending the filing and final disposition of this petition for writ of certiorari through and including March 26, 1975*. This Court's jurisdiction is invoked under 28 U.S.C., § 1254 (1).

QUESTIONS PRESENTED

Was the petitioner deprived of due process of law by the failure of the trial judge to issue petitioner, who was seated quietly in the courtroom and not expecting to be addressed by the trial judge, a prior warning that petitioner's failure to step forward upon the command of the trial judge would be punished criminally?

Was the petitioner's conditional and respectfully asserted refusal to step forward without his retained counsel upon the command of the trial judge, just moments before the trial judge exited the courtroom for the luncheon recess, a material obstruction of justice which could be summarily punished under 18 U.S.C., § 401(1)?

Was the Court of Appeals correct in its holding that petitioner's conviction for contempt of court could be upheld even though the trial judge incorrectly proceeded under

* The March 26, 1975 date is incorrect. The date should have been March 29, 1975 — thirty days from the denial of the petition for rehearing, February 27. The Clerk of that Court has been notified of the error and time for notifying the Court of the docketing of this petition extended accordingly.

Rule 42(a), when petitioner's conviction rests in its entirety or partly upon the biased opinions of the trial judge that petitioner was "slouched" in his seat, and where petitioner has never had an opportunity to challenge the correctness of the trial judge's description?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment, United States Constitution: ". . . no person shall be deprived of life, liberty or property without due process of law . . . ."

STATUTES AND RULES INVOLVED

18 USC §401 empowers Federal Courts ". . . to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; . . ."

Rule 42 (a), Federal Rules of Criminal Procedure, provides:

"SUMMARY DISPOSITION: A criminal contempt may be punished summarily if the judge certified that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."

Rule 42 (b):

"A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such."

STATEMENT OF THE CASE

Petitioner, MANUEL GLENN ABASCAL, was indicted with eight others on March 16, 1973. The indictment is in six counts. Petitioner was named in count one, charging an alleged conspiracy to violate 21 U.S.C.,§ 841, 846,952, 960 and 963, and in count six, charging a violation of 21 U.S.C., § 846 and 963; offenses charging importation, possession and distribution of controlled substances.

On June 20, 1974, petitioner was present in court in San Diego. He had accompanied his counsel, who, by order of the district court judge, was required to be present with members of counsel's staff while the recordation of data in the Clerk's Office of the District Court was being done on the prospective jury challenge on behalf of petitioner.

A hearing was in progress on behalf of one of petitioner's co-defendants in the alleged conspiracy, and petitioner ABASCAL was in the courtroom observing, while his counsel was in the Clerk's Office.

The facts out of which the alleged contempt arose are uncontradicted and are as follows:

THE COURT: At this time we will take our noon recess. We will be in recess now because I have a conference in another case at one-thirty. We will be in recess now until two o'clock, two o'clock this afternoon.

MR. EISENBERG: Your honor, the previous admonition that we've had regarding the government and Sheriff De Puy, may remain in effect?

THE COURT: Yes.

MR. FANNING: No problem, your honor.

THE CLERK: All rise.

THE COURT: Mr. Abascal, would you step forward, please?

DEFENDANT ABASCAL: (No response)

THE COURT: Step forward please.

DEFENDANT ABASCAL: Not without my counsel, sir.

THE COURT: Mr. Cecil, he's in contempt of court. I've told him to step forward. He has refused to get out of his seat. Put him in jail." (App. A at 2).

Petitioner was placed in custody of the United States Marshalls and was returned to the courtroom at 4:30 p.m., on June 20, 1974. (R.T. 5-9).* The district court judge at that time explained his reasons for having commanded MR. ABASCAL to "step forward." The judge then indicated that at the midmorning recess he had observed that Mr. ABASCAL had not stood up when the Clerk ordered "All rise", as the judge left the bench. (Appendix B, at 5). The judge had directed his secretary to prepare a statement which he intended to read to MR. ABASCAL about his conduct when he had ordered him to step forward, "had he seen fit to do so". (R.T. 3-5).

MR. BRITTAIN, counsel for petitioner, was apprised that petitioner was adjudged in contempt of court pursuant to Rule 42(a). (R.T. 5-6). Counsel challenged the jurisdiction of the district court judge to convict summarily; he pointed out that the adjudication of contempt was void because the judge had not warned MR. ABASCAL that his conduct would be punished criminally (R.T. 6) and called the district judge's attention to the decision of this Court in *Bitter v. United States*, 389 US 15 (1967), which requires a warning as a condition precedent, when practicable, to a summary commitment. (R.T. 6). Counsel also made the observation that other sanctions were available and that the evidence failed to show an "actual and material" obstruction to the administration of justice, as opposed to a subjective personal slight to the presiding judge. (R.T. 6-7).

Petitioner, only then aware of what the intentions of the judge had been, explained he intended no disrespect to the

---

* R.T. refers to Reporter's Official Transcript of Proceedings.

court. He emphasized that at the time of the alleged contempt he merely "required or requested" for his "fundamental legal right" to have his counsel present to be indulged before he was "brought up in front of the Court". (R.T. 9).

The Honorable GORDON THOMPSON, JR., then proceeded to pronounce sentence. Petitioner was remanded to the custody of the Attorney General for ninety (90) days, stating he found petitioner guilty of "insolent behavior" which "interfered with the judicial process in that it was a direct affront to the dignity of this court." (R.T. 10). The Certificate of Contempt, entered the following date reiterated the district court judge's view of petitioner's conduct. (Appendix A). The motion for a stay of the sentence pending appeal was denied, as was the motion for bail pending appeal. (R.T. 11-12). Petitioner was released on July 2, 1974, on order from the Circuit Court.

On appeal to the Ninth Circuit Court of Appeals, petitioner raised the following issues and contentions:

> (1) His refusal to step forward when requested by the court at the noon recess did not interfere with the administration of justice and therefore was not contemptuous; (2) the court should have warned him that his conduct could subject him to criminal penalties; (3) the summary contempt procedure of Rule 42 (a) was inappropriate; and (4) there was a likelihood of prejudice on the part of the trial judge rendering him unable to fairly adjudicate the matter of appellant's contempt. (App. B, at 6).

In affirming the contempt citation, the Ninth Circuit concluded "that petitioner's refusal to step forward combined with his apparent disrespect for the court as manifested by his courtroom demeanor constituted an obstruction to the administration of justice punishable under 18 U.S.C., § 401". *Ibid* at 5. The demeanor referred to is that petitioner "remained slouched in his seat."

Although finding that petitioner's behavior was "contemptuous and punishable under 18 U.S.C.,§ 401," the Ninth Circuit found that it "did not constitute 'exceptional circumstances' requiring 'immediate penal vindication of the dignity of the Court' pursuant to Rule 42 (a)" (App. B,at 13) and that "the sentence imposed was excessive." *Ibid.* Nevertheless, the Ninth Circuit did not overturn the conviction but instead remanded the case for vacation of the remainder of the sentence. Relying on the ABA Standards for Criminal Justice, Function of the Trial Judge, Section 712, the Ninth Circuit determined that, although "a warning would have been appropriate, we cannot hold that the failure to warn constituted reversible error" (App. B, at 8).

REASONS FOR GRANTING THE WRIT

I It Is Important For this Court to Firmly Establish That the Trial Judge's Total Failure to Warn Petitioner That Petitioner's Peaceful and Respectful Conduct Would Be Punished Criminally Deprived Petitioner Due Process of Law in Violation of The Fifth Amendment, United States Constitution.

Without any warning or advance notice whatsoever, petitioner was summarily charged, tried, convicted, and jailed for a federal offense. "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both" *Bloom v. Illinois,* 391 U.S. 194, at 201 (1968). Criminal contempt is an integral part of the federal penal code. See 18 U.S.C.,§401(1), *supra.*

Until the trial judge ordered MR. CECIL to jail him, petitioner had no idea that his conduct would be punished criminally. (App. A, at 2). Petitioner was not an "activist seeking combat." He was not "hurling epithets" at the trial judge; nor had he turned the "courtroom into bedlam". See *Mayberry v. Pennsylvania,* 400 U.S. 453 (1971). Petitioner

was quietly seated, observing the proceedings. This case provides the Court an opportunity to determine whether a warning is Constitutionally required before such conduct may be summarily converted into a crime.[1]

In *Taylor v. Hayes*, . . . U.S. . . ., 94 S Ct. 2697, 42 US LW 5180 (June 26, 1974), This Court held that when a contempt adjudication occurs after the completion of the trial, the contemner is entitled to notice and an opportunity to be heard. Such procedures were considered essential to contempt proceedings due to "the heightened potential for abuse posed by the contempt power", 42 USLW, at 5184. The contemner was accorded these "fundamental due process protections", because contemner "facing a jail sentence his 'liberty [is] valuable and must be seen as within the protection of the Fourteenth Amendment'." *Ibid.* In the context of the contempt adjudication during the trial, a warning is Constitutionally apropos. A warning would provide "some orderly process, however informal" to the contemner and accord him with some measure of "elementary fairness" before his liberty could be summarily terminated. *Ibid.*

---

1 This Court and numerous federal courts have considered warnings to be essential to their holdings in contempt cases, but no court has yet required a warning as a matter of federal Constitutional law. Warnings were given in each of the following cases: *Sacher v. United States*, 341 U.S. 1, at 10-11 (1952), aff'g. 182 F. 2d 416, at 459 (2nd Cir., 1950); *United States v. Green*, 176 F. 2d 169 (2nd Cir., 1948); *cert. denied* 388 U.S. 851 (1949); *Offutt v. United States*, 348 U.S. 11, at 12 (1954); *United States v. Dennis*, 183 F. 2d 201, at 224 (2nd Cir., 1950); *United States v. Rinieri*, 308 F. 2d 24 (2nd Cir., 1962) *cert. denied*, 371 U.S. 935 (1962); *United States v. Bollenbach*, 125 F. 2d 458 (2nd Cir., 1942); *Johnson v. United States*, 344 F. 2nd 401 (5th Cir., 1965); *United States v. Sternman*, 415 F.2d 1165, at 1167,1170 (6th Cir., 1969); *In re Atterbury*, 316 F. 2d 106, at 107 (6th Cir., 1963); *Appeal of the United States Securities and Exchange Commission*, 226 F. 2d 501 (6th Cir., 1955); *Sibley v. United States*, 236 F. 2d 234 (9th Cir., 1956) *cert. denied*, 352 U.S. 922 (1956); *Wong Gim Ying v. United States*, 231 F. 2d 776, at 778 (DC Cir., 1956); and *United States v. Piccolo*, 395 F. Supp. 955 (D.C. Conn., 1967), *Brown v. United States*, 356 U.S. 148 (1958).

In *Bitter v. United States, supra,* the defendant had been given permission to leave the court and go to his office to gather evidence for his defense. The defendant was 37 minutes late returning to court. The trial judge summarily committed the defendant to custody for the remainder of the trial. The Court reversed the conviction, stating: "Without warning, hearing, or explanation, the trial judge ordered petitioner into custody for the balance of the trial." 389 U.S., at 16. The Court noted that the summary commitment "had the appearance and effect of punishment rather than of an order designed solely to facilitate the trial" *Ibid.* The Court added an admonition that, "Punishment may not be so inflicted," and cited Rule 42, FRCrP, governing the contempt power. *Ibid.* Thus, this Court has clearly held that summary commitment during trial, as punishment for disobedience to a court order, was invalid in the absence of a warning.

In *Illinois v. Allen,* 397 U.S. 337 (1971). This Court held that a disruptive defendant might be removed from his own trial. The necessity for a warning was crucial to the Court's holding. Mr. Justice Black stressed the fact that Allen had been repeatedly warned by the trial judge that he would be removed from the courtroom if he persisted in his unruly conduct, 397 U.S., at 346. Mr. Justice Brennan, concurring, further emphasized that "no action against an unruly defendant is permissible except after he has been fully and fairly warned . . . that his conduct is wrong and intolerable and warned of the possible consequences of continued misbehavior." 397 U.S., at 350.

As a bare minimum, due process requires that an adjudication of contempt be preceded by a warning. A prior warning would aid trial judges and appellate courts in their effort to restrict the contempt power "to the bedrock cases where concession of drastic power to the courts is necessary to enable them to preserve their authority and to insure the maintenance of order and decorum in the proceedings before them." *Farese v. United States,* 209 F. 2d 312, at 315 (1st Cir., 1954).

A warning requirement would allow only those cases to be prosecuted where invocation of the contempt power was absolutely necessary to prevent an obstruction of justice and to vindicate the dignity of the court. Conceivably a person who has been warned that his conduct may be punished criminally would refrain from further misbehavior. Thus, a warning would enhance the deterrence value of the contempt power and encourage voluntary compliance with court orders and self-discipline.

A warning requirement would cure the vice of vagueness and overbreadth in the statute. Section 401(1) prohibits 'Misbehavior.' The term is an extremely vague and broad one. (Consider *Gooding v. Wilson*, 405 U.S. 518 (1972), involving Georgia's opprobrious language statute on overbreadth grounds.)

The gloss frequently placed on Section 401 (1), that it applies only to "misbehavior which obstructs the administration of justice", adds neither precision nor clarity to the statute. "Obstruction to the administration of justice" is obviously a rather vague and overinclusive phrase. Without a warning, that phrase could reasonably be construed to forbid the "doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application and thus to violate the first essential of due process." *Connally v. General Const. Co.*, 269 U.S. 385, at 391 (1961).

A warning however would place the contemner on notice that his conduct will no longer be tolerated. A warning would facilitate the intelligent exercise of the broad review power accorded federal courts in contempt cases. A line of demarcation could be precisely determined with respect to innocent and guilty conduct.[2] The post-warning conduct would invariably constitute the evidence on which the contempt conviction would be based.

---

2. See *Green v. United States*, 356 U.S. 165(1957); *Note*, 109 U. Pa L. Rev. 67, at 80 n. 72 (1960).

A warning prevents a summary contempt conviction from resting entirely or partially upon the virtually unassailable opinions of the trial judge, describing the courtroom demeanor of the contemner. The certificate filed by the trial judge, pursuant to Rule 42(a), FRCrP, recited that, "the acts and demeanor of the [petitioner] in twice refusing to step forward and willfully remaining *slouched* in his seat while being personally addressed to be a direct and deliberate confrontation with this court." (App. A, at 2-3). (Emphasis added). The trial judge referred to alleged *"hostility and discourtesy"* generated in the courtroom. *Ibid.* at 2. (Emphasis added).

Justice Traynor, in *Gallagher v. Municipal Court*, 31C. 2d 784 (1948), perceived a *warning* to be a cure for this exact vice. There, the trial judge, who pursuant to California Code of Civil Procedure, § 1211 is required to file an order comparable to a Rule 42(a) certificate, described the defendant's tone of voice as having been "loud, insolent, aggressive, belligerant, boisterous, harsh, offensive" and had a "sneering contemptuous expression" on his face, 31 C2d, 796-97. In response to those recitals of misconduct, Justice Traynor observed:

> "If the words used by counsel are respectful and pertinent to the matter before the court, it is not unnecessarily burdensome to require the judge *first to warn* the attorney that his tone and facial expressions are offensive and tend to interrupt the due course of the proceedings. Otherwise, attorneys could be subjected to fines and jail sentences because of personal annoyance and pique on the part of trial judges; *and these penalties could be rendered unassailable, as is contended here, by lengthy recitals in the orders of contempts respecting the demeanor of the contemner.*" 31 C. 2d, 797. (Emphasis added.)

The trial judge failed to warn petitioner that his tone of voice or choice of words were offensive. The trial judge also failed to warn petitioner that he would consider his refusal

to step forward to be insolent or that he disapproved of petitioner's posture. Thus, it is clear that the failure to warn petitioner his conduct would subject him to criminal punishment deprived him of due process of law.

The Ninth Circuit distinguished its own prior decisions in *Yates v. United States*, 227 F.2d 848, at 851 (9th Cir., 1955); and *Dashbach v. United States*, 254 F. 2d 687, 692 (9th Cir., 1958), in which summary comtempt convictions were reversed, because a "prior positive notification" was not given the contemners that "criminal penalties in addition to the civil contempt measures might be imposed for their failure to answer." (App. B, at 7, fn. 2). The Ninth Circuit decided that "a warning would have been appropriate", but refused to hold that failure to do so constituted reversible error. The Ninth Circuit approved Section 712, the ABA Standards for Criminal Justice, Function of the Trial Judge, which requires "a clear warning" that conduct is improper before the contempt sactions may be imposed[3] The failure of the Ninth Circuit to apply its own cases to this case is such a departure from law that this Court should grant certiorari in the exercise of its supervisory power and summarily reverse petitioner's conviction.

II. It Is Important For This Court To Firmly Establish, By Reversing The Judgment Below, That The Exercise Of The Summary Contempt Power Is Only Appropriate When There Is An Actual And Material Obstruction Of Justice, And Not Merely An Affront To The Trial Judge's Sensibilities.

A. No Actual And Material Obstruction of The Administration of Justice Occurred.

In the record of this case, there is no evidence to show beyond a reasonable doubt that petitioner's conduct resulted in an actual "obstruction to the performance of a judicial duty". The court was in recess when the alleged misconduct occurred (App. B, at 10). The judge was "leaving the bench". *Ibid.* The trial judge's attention returned to the

3. See App. B, at 8, fn. 4.

courtroom due to the perfunctory inquiry of counsel for a co-defendant, as to whether the admonitions to a witness were still in effect (App. B, at 5). All the concerned parties readily agreed that the admonitions were still effective (App. A, at 2). At that point, the trial judge noticed that petitioner was seated and apparently had not stood in response to the ceremonial order, "All rise".

The record does not reflect the rapidity with which the district court judge first commanded petitioner to step forward and then summarily convicted him. However, it would be reasonable to infer that only a few seconds elapsed at best.

The decision below is contrary to controlling decisions of this Court. *Ex parte Hudgings*, 249 U.S. 378 (1919); *In re Michael*, 326 U.S. 224 (1954); and *In re McConnell*, 370 U.S. 230 (1962). Even though there was no objective evidence that petitioner's conduct actually obstructed the administration of justice, the Ninth Circuit upheld petitioner's conviction. The Court of Appeals stated that petitioner's "refusal to step forward combined with his apparent disrespect for the court as manifested by his courtroom demeanor constituted an obstruction to the administration of justice punishable under 18 United States Code, §401." (App. B, at 7). In an unbroken line of decisions stretching over a half century or more, This Court has held that a criminal conviction for contempt must rest upon an actual, not a theoretical, obstruction which "must clearly be shown in every case where the power to punish for contempt is exerted. . ." *Ex parte Hudgings, supra*, at 383.

Petitioner's case is indistinguishable in principle and factually stronger than any of the just cited cases.

Ex parte Hudgings, supra, involved a trial witness who was reluctant to testify that he had actually observed persons write their respective names. The trial judge disbelieved the witness' disclaimer of personal knowledge and interrogated the witness himself but to no avail. The witness was persistent in his disclaimer and provoked the judge to

interrupt the trial and summarily commit the witness for contempt of court. 249 U.S., at 381.

This Court reversed the contempt conviction because there was *no* evidence to show *an actual* obstruction of justice. The Court stated:

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, *it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted* — a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. (Citation omitted) It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. *But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing.* If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled." 249 U.S. at 383-84. (Emphasis added).

In re Michael, supra, dealt with a witness who had given perjured testimony before a grand jury. The District Court found that Michael's testimony "was of a type tending to block the inquiry and consequently, 'an obstruction of the administration of justice. . .' " 326 U.S., at 225. The Circuit Court, while finding that Michael had not been "contumacious or obstreperous", accepted the District Court's finding that his conduct had obstructed justice. *Ibid.* Relying upon *Ex parte Hudgings, supra,* this Court reversed. Perjury alone was insufficient to constitute an actual obstruction of justice, Mr. Justice Black held for a unanimous Court, 326 U.S. at 228-29.

In re McConnell, supra, involved a lawyer who testily threatened to continue questioning a witness, after the trial judge had ordered him to stop, "unless some bailiff stops us", 370 U.S., at 235. This Court noted that the "bailiff never had to interrupt the trial by arresting petitioner" and held that McConnell's conduct could not amount to a contempt of court, unless it "in some way [created] an obstruction which [blocked] the judge in the performance of his judicial duty." 370 U.S., at 236.

The decision and judgment of the Ninth Circuit provides the same ominous potential for oppression and wrong as confronted the litigants in *Ex parte Hudgins, supra; In re Michael, supra;* and *In re McConnell, supra.* Unless corrected by this Court, lower federal courts will be permitted to invoke the summary contempt power on the basis of nothing other than the trial judge's *subjective reaction* to a person's posture or failure to respond to an order with military-like alacrity. Court orders not only should be, but they must be obeyed. Still, our courtrooms are not drill fields, and our trial judges are not supposed to be drill sergeants. Only disobedience which *actually* obstructs the administration of justice may be punished as a criminal contempt. The courts below failed to observe this essential distinction, which has been drawn by this Court in a long and unbroken line of precedents, and, therefore, erred by affirming petitioner's contempt conviction.

B. The Record Shows That Petitioner's Failure To Step Forward Was For A Meritorious Reason And Other Less Drastic Remedies Were Available Which Made Summary Contempt Inappropriate.

Petitioner refused to step forward solely because his counsel was not present. The desire to have his counsel present would only justify the contempt conviction if it were asserted in bad faith. See *Maness v. Meyers*, 43 US LW 4143, No. 73-689 (decided January 15, 1975). Petitioner's statement that he could not step forward without counsel was sufficient to alert the trial judge that petitioner was not waiving the right to counsel and was requesting the presence of counsel to advise him fully as to whatever matters the trial judge was intending to take up with him. Petitioner's counsel was on the scene and in a position to afford petitioner the protection he desired without any undue delay of the proceedings.

This Court has recognized that the power of summary contempt may be used to assure the orderly continuation of the trial or proceedings only after less drastic remedies have been tried. This restriction on the use of the summary contempt power gives life to the principle that the contempt power must be limited to "the least possible power adequate to the end proposed". *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821).

It results in both a limitation on the scope of Section 401 (1), 18 United States Code, and the occasions when it may properly be invoked as well. As This Court has said:

"This doctrine further requires that the trial judge consider the feasibility of . . . the imposition of criminal contempt. The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate." *Shillitani v. United States*, 384 U.S. 364, 371, fn 9 (1966).

In holding that other less drastic remedies must be first considered before the sanction of criminal contempt may be imposed, the Court was adopting the view which had been expressed by Mr. Justice Brennan in his dissent in *Brown v. United States*, 356 U.S. 148, 163 (1958):

> "... I think that in contempts, as in other areas of the law, penal sanctions should be used sparingly and only where coercive devices less harsh in their effect would be unavailing. In other words, there is a duty on the part of the district judges not to exercise the criminal contempt power without first having considered the feasibility of the alternative at hand".

There were numerous less drastic and constitutionally desirable and effective alternatives other than summary contempt — *the least of which is a verbal warning that specific conduct is prohibited.* The failure of the district court judge to resort to any alternative short of summary contempt resulted in a needless[4] and dangerous expansion of the summary contempt powers.

C. The Contempt Adjudication Results From An Apparent Confusion Of The Sensibilities Of The Trial Judge With An Obstruction Of Justice.

The decision below is contrary to decisions of this Court which have cautioned judges "against confusing offenses to their sensibilities with obstruction to the administration of justice." *Brown v. United States*, 356 U.S. 148, at 153 (1958); *Offutt v. United States*, 348 U.S. 11, at 14 (1954); and *Craig v. Harney*, 331 U.S. 224 (1945). The Ninth Circuit clearly confused an affront to the trial judge's sensibilities with an obstruction to justice.

4. 'Needless' is used here to mean "the absence of necessity" which petitioner defines to mean clearly indispensible, not merely convenient or desirable. See *Green v. United States, supra*, at p213 (dissenting opinion of Mr. Justice Black).

Petitioner's conviction was sustained on the basis that his "refusal to step forward combined with his apparent disrespect for the court manifested by his courtroom demeanor constituted an obstruction to the administration of justice. . ." (App. B, at 7). The "courtroom demeanor" to which the Ninth Circuit refers, "willfully remaining slouched in his seat while being personally addressed" by the trial judge, was not found by the trial judge to have been an actual obstruction of justice (App. A, at 2). The trial judge found petitioner's conduct to have been "a direct and deliberate confrontation with this court" (App. A, at 2). The trial judge never found that petitioner's alleged conduct constituted "an obstruction of justice".

The trial judge's descriptive opinions of petitioner's posture reveal personal embroilment and pique. The trial judge perceived petitioner's act of quietly sitting in his chair as an attack on his ability to control the courtroom. The trial judge's annoyance is revealed by his statement, unsupported by reference to any objective facts, that the record is inadequate to "reflect the true intensity of the hostility and discourtesy that the [petitioner's] behavior generated in this court's presence". (App. A, at 2). This statement shows without a doubt that the trial judge was personally offended, because, for a few seconds during rather protracted pre-trial proceedings, petitioner did not exhibit a deferential attitude towards him. However, "[t]he law of contempt is not made for the protection of judges who may be sensitive. . . . Judges are supposed to be men of fortitude able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S., at 376.

D. Certiorari Should Be Granted To Resolve Conflict Between The Circuits As To Whether A Failure To Obey A Court Order Which Does Not Result In An Actual And Material Obstruction Of The Administration Of Justice May Be Punished As A Summary Contempt.

This court should grant certiorari to resolve conflicts between the circuits. The Fourth and Seventh Circuits have held that the failure to comply with a formal or ceremonial order, alone, cannot support a summary contempt conviction under Section 401(1), 18 United States Code. *United States, v. Snider,* 502 F. 2d 645 (4th Cir., 1974); and *In re Dellinger,* 461 F. 2d 389, at 401 (7th Cir., 1972), aff'd after remand, *sub. nom., Dellinger v. United States,* 502 F. 2d 813, cert. pending, No. 74-714, filed December 9, 1974, 43 USLW 3439 (1975).

The conflict is stronger between the Fourth and Ninth Circuits. In *United States v. Snider, supra,* the Fourth Circuit held that:

> "We are thus led to the conclusion, and so hold, that the mere failure to rise upon command of the marshal in a United States courtroom is not misbehaviior within the meaning of 18 U.S.C.,Sec.401 and does not constitute criminal contempt of court. To so hold will not, we think, tend to diminish respect for the judiciary and for the administration of justice. We do not envision, as the result of our decision today, disorder flourishing in the courtroom. Instead, we anticipate the custom of rising upon the convening and adjournment of court will continue and become more significant because wholly voluntary". 502 F. 2d, at 661.

The Ninth Circuit would avoid the conflict between it and the Fourth and Seventh Circuits by distinguishing this case on its facts. Referring to the conflict with *In re Dellinger, supra,* the Ninth Circuit stated:

"Here we are concerned with more than merely the observance of the formality of rising at the end of a court session. [Petitioner] defied a clear order directed to him personally by the court. The ability of a trial judge to compel obedience to his orders is fundamental to the proper functioning of our system of justice. Whether a person be directly involved in a judicial proceeding or simply a spectator, he is subject to all reasonable orders of the court, even those given at the end of a court session" (App. B, at 7).

The Ninth Circuit failed to distinguish between orders which are essential to the proper functioning of the court and those which are non-essential. It was not essential for petitioner to "step forward" for the trial judge to have read his statement to him. That purpose could have been accomplished whether or not petitioner sat in place or stood in place. It might, indeed, have comported with our sensibilities as to what conduct constitutes proper decorum in a courtroom for petitioner to have stepped forward; however, his failure to do so could not reasonably be deemed a material obstruction of justice.

On the facts of this case, petitioner's conviction has an ugly twist. It seems as though the trial judge purposefully set the stage for a contempt adjudication and pursued a planned course of action to achieve his objective. Compare *Cooper v. Superior Court*, 55 Cal. 2d 291, at 302, 10 Cal Rptr. 842 (1961). The trial judge acted unreasonably by ordering petitioner to step forward. The asserted purpose of requesting petitioner to step forward was to deliver a message to him in the *absence* of his counsel about his failure to rise. The trial judge's conduct borders on entrapment and was clearly injudicious, as is indicated by the prior preparation of a specific warning to be read to petitioner. Chief Justice Burger has observed: "Every judge must remember that no matter what the provocation, the judicial response must be a judicious response and that no one more surely sets the tone and the pattern for courtroom conduct

than the presider." Burger, "The Necessity for Civility," 52 F.R.D. 211, at 215.

The decision in this case is in conflict with other decisions of the Ninth and Seventh Circuits. In *Comstock v. United States*, 419 F. 2d 1128 (9th Cir., 1969), the Ninth Circuit confirmed a summary contempt conviction in which there was a *merger* of a failure to rise and other clearly disruptive misbehavior. There, the defendant was personally admonished by the trial judge to rise. The defendant refused. The trial judge then personally directed the defendant to approach the bench, and he again refused to comply. When a Marshal attempted to escort the defendant to the bench, he resisted and prostrated himself on the courtroom floor, as the trial judge addressed him. 419 F. 2d, at 1131.

The Seventh Circuit likewise requires a *merger* of a failure to rise and evidence of "some disturbance, disorder or interruption. . ." *United States ex rel Robson v. Malone*, 412 F. 2d 848 (7th Cir., 1969); and *In re Chase*, 468 F. 2d 128 (7th Cir., 1972).

This case differs from any of the reported cases because it permits a summary conviction for contempt to rest on a mere failure to rise or step forward, since petitioner could hardly have stepped forward without rising, and conclusionary statements in the form of a highly opinionated description of petitioner's posture. Neither the Court of Appeals nor the trial judge articulate any fact which shows that petitioner's conduct "in any wise disrupted the court proceeding." *In re Larry Little*, 404 U.S. 553, at 555 (1972). The reason neither court was able to do so is very simple: there was nothing going on in the district court to disrupt since Court was in recess.[5]

---

5. In *United States v. Seale*, 461 F. 2d 345, at 369 (7th Cir., 1972), the Seventh Circuit held that the obstruction resulting from failure to obey a court order had to be "material" and "not merely any interruption" of the court. See also *U.S. ex. rel. Robson v. Oliver*, 470 F. 2d 11, at 14 (7th Cir., 1974). The Second Circuit requires an open threat to orderly procedure and flagrant defiance. *United States v. Mara*, 482 F. 2d 1196, at 1201 (2nd Cir., 1973). In the Sixth Circuit evidence of reckless disre-

III The Supervisory Power Of This Court Should Be Exercised To Correct The Decision Of The Ninth Circuit Which Upholds Petitioner's Conviction Even Though That Court Ruled That Petitioner Was Improperly Proceeded Against Under Rule 42(a), FRCrP, Where The Conviction Depends Upon The Correctness Of The Trial Judge's Characterization Of Petitioner's Courtroom Posture.

The Ninth Circuit held that petitioner's conduct "did not constitute 'exceptional circumstances' requiring 'immediate penal vindication of dignity of the court' pursuant to Rule 42(a). . ." (App. B, at 13).[6] However, the court below nevertheless affirmed petitioner's contempt conviction. This was plain error which this Court should correct by the exercise of its supervisory power.

Petitioner's conviction rests in part upon the fact findings of the trial judge who, for purposes of the contempt power, was also a witness against petitioner. The Ninth Circuit held that petitioner had committed a punishable act of contempt by his refusal to step forward "combined with his apparent disrespect for the court as manifested by his courtroom demeanor. . ." (App. B, at 7). Thus, it is clear that petitioner's conviction rests upon "facts" or perhaps the opinion of his accuser that his conduct was improper, which petitioner has not had an opportunity to challenge. Under the procedures called for under Rule 42(b), FRCrP, peti-

Footnote 5 continues --

gard for a court order or persistence is necessary to show the commission of a criminal contempt. *United States v. Belahanty*, 488 F. 2d 396 (6th Cir., 1973); *United States v. Seavers*, 472 F. 2d 607 (6th Cir., 1973); and *United States v. Schiffer* 351 F. 2d 91, at 95 (6th Cir., 1965). The District of Columbia Circuit likewise requires evidence of reckless disregard. *In re Nieback*, 476 F. 2d 930 (DC Cir., 1973); and *United States v. Meyer*, 462 F. 2d 827 (DC Cir., 1972).

6 Petitioner need not dwell on the validity or invalidity of a Rule 42(a) adjudication. The Court has recently heard arguments on that very question. *United States v. Wilson*, No. 73-1162, 43 USLW 3371 (January 7, 1975), argument heard December 17, 1974; certiorari granted to review 488 F. 2d 1231 (2nd Cir., 1973).

tioner would at the very least be allowed to file affidavits which could challenge the trial judge's opinion respecting petitioner's courtroom demeanor. Further, the decision of the Ninth Circuit deprives petitioner of the benefit of the decision of this Court in *Taylor v Hayes, supra,* providing for prior notice and an opportunity to be heard. Petitioner's case was on appeal when *Taylor v. Hayes* was decided on June 26, 1974.[7]

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

HOWARD MOORE, JR.
COLE A. POWELL
1880 San Pedro
Berkeley, California 94707
415/527-7656

Attorneys for Petitioner

March 26, 1975

(Appendices Follow)

7 The Ninth Circuit held that the hearing the trial judge provided petitioner later in the afternoon following his contempt conviction did not satisfy the demands of due process (App. B, at 11 fn. 9). Petitioner does not contest the correctness of that holding.

Appendix A

United States District Court
Southern District of California

No. 14829

UNITED STATES OF AMERICA EX REL
JUDGE GORDON THOMPSON, JR.,

vs.

MANUEL GLENN ABASCAL

[Filed, June 24, 1974]

CERTIFICATE OF CONTEMPT

In conformity with Rule 42(a) of the Federal Rules of Criminal Procedure and Title 18, United States Code, Section 401 I hereby certify that I saw and heard the conduct set forth below, which conduct took place in the actual presence of the court during pretrial motion hearings of the case entitled *United States of America v. Mary Elizabeth Batchelder, et al.*, 14579, 14580 and 14829 Criminal which commenced on June 4, 1974 and has continued to the date of this order.

I find that the conduct of the defendant Manuel Glenn Abascal hereinafter specified, constituted contempt of this court and was of such an insolent nature as to directly affront the decorum and dignity of this United States Court. I firmly believe that if this court cannot require those who are in its courtroom to obey the court, then this court would lose any control it has over its own court and courtroom. Such behavior will not be tolerated by this court, and under the circumstances, I don't think it should be tolerated by any court.

Accordingly, I adjudge the defendant Manuel Glenn Abascal guilty of the criminal contempt described below. I also state that a reading of this record cannot and does not adequately reflect the true intensity of the hostility and discourtesy that the defendant's behavior generated in this court's presence.

THE COURT: At this time we will take our noon recess. We will be in recess now because I have a conference in another case at one-thirty. We will be in recess until two o'clock, two o'clock this afternoon.

MR. EISENBERG: Your honor, the previous admonition that we've had regarding the government and Sheriff De Puy, may remain in effect?

THE COURT: Yes.

MR. FANNING: No problem, your honor.

THE CLERK: All rise.

THE COURT: Mr. Abascal, would you step forward, please?

DEFENDANT ABASCAL: (No response)

THE COURT: Step forward, please.

DEFENDANT ABASCAL: Not without my counsel, sir.

THE COURT: Mr. Cecil, he's in contempt of court. I've told him to step forward. He has refused to get out of his seat. Put him in jail.

Accordingly, it is therefore ordered that pursuant to the authority vested in this court by Rule 42(a) of the Federal Rules of Criminal Procedure, and by Title 18, United States Code, Section 401, the defendant Manuel Glenn Abascal be punished for the contemptuous conduct cited above. I find that the acts and demeanor of the defendant in twice refusing to step forward and his willfully remaining slouched in his seat while being personally addressed to be a direct and deliberate confrontation with this court. The insolent behavior was of such a nature as to make the imposition of a fine a wholly insignificant punishment.

Therefore it is further ordered that the defendant Manuel Glenn Abascal be and he is hereby ordered committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of 90 days.

Dated: June 21st, 1974

GORDON THOMPSON, JR.,

United States District Court

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

MANUEL GLENN ABASCAL,
Defendant-Appellant.

No. 74-2227

January 9, 1975

Appeal from the United States District Court
for the Southern District of California

Before: KOELSCH and WALLACE, Circuit Judges and JAMESON,* District Judge.

JAMESON, District Judge:

Manuel Glenn Abascal appeals from a conviction for criminal contempt in violation of 18 U.S.C. § 401. The district court, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, summarily found appellant guilty of contempt and imposed a ninety day sentence.

The appellant was one of nine persons charged in a six count indictment with various offenses involving the illegal importation and possession of narcotics with the intent to distribute. At the time of the alleged contempt, appellant, who was free on bond, was attending a hearing before the district court on a motion made by one of his co-defendants. Appellant had come to the courthouse with his counsel

*Honorable W.J. Jameson, United States Senior District Judge for the District of Montana, sitting by designation.

to examine records in the clerk's office in connection with a separate motion on behalf of appellant. While his attorney was in the clerk's office, appellant entered the courtroom. Although he had apparently been asked to attend the hearing by counsel for the co-defendant, appellant was not directly involved in the proceedings nor was his presence in court required.

Court was recessed for fifteen minutes during the morning session. The clerk ordered those present to rise. Appellant remained slouched in his seat. When the court reconvened appellant was not present but subsequently returned. Noting appellant's conduct at the opening session, the judge had his secretary prepare a statement which he intended to read to appellant.[1]

At the noon recess, as the judge stood to leave the bench, the clerk ordered all to rise. At that moment counsel for appellant's co-defendant asked the judge a question which was quickly answered. The clerk again ordered "All rise". Everyone in the courtroom with the exception of the appellant rose. The following colloquy then occurred:

> "The Court: Mr. Abascal, would you step forward, please?
>
> "Defendant Abascal: (No response).
>
> "The Court: Step forward, please.
>
> "Defendant Abascal: Not without my counsel, sir.
>
> "The Court: Mr. Cecil, he's in contempt of court. I've told him to step forward. He has refused to get out of his seat. Put him in jail."

That afternoon appellant, with his counsel, appeared before the court. Reviewing the incident of the morning, the

---

[1]The statement read:

"Mr. Abascal, it concerns me not whether you have any respect for me personally. However, I do demand respect for this court. I suggest that if you entertain any thoughts of becoming an attorney, you conduct yourself accordingly while in the courtroom. This includes standing during

judge stated that he had asked the appellant to step forward for the purpose of reading him the statement he had prepared. Appellant's counsel was given an opportunity to comment. Following the remarks of his counsel, appellant stated:

"I'd like to address the Court and state that, as an institution, I meant no disrespect to the Court and that I required or requested for my fundamental legal right that my counsel be present before I be brought up in front of the Court".

The court termed appellant's conduct "insolent" and held that it "interfered with the judicial process in that it was a direct affront to the dignity of this court". Relying on Rule 42(a), the 90 day sentence was imposed. Following the hearing, the judge filed a formal Certificate of Contempt as required by Rule 42(a). In the Certificate he held that the appellant's failure "to step forward and his willfully remaining slouched in his seat while being personally addressed" were contemptuous and that he had seen and heard this contemptuous behavior which took place in the actual presence of the court.

Contentions on Appeal

Appellant contends that (1) his refusal to step forward when requested by the court at the noon recess did not interfere with the administration of justice and therefore was not contemptuous; (2) the court should have warned him that his conduct could subject him to criminal penalties; (3) the summary contempt procedure of Rule 42(a) was inappropriate; and (4) there was a likelihood of prejudice on the part of the trial judge rendering him unable to fairly adjudicate the matter of appellant's contempt.

Footnote 1 continues —
the opening and closing of each court session. Your continued failure to do so will result in this court's order that except during the hearings involving yourself, you will absent yourself from the courtroom, along with such other sanctions as this court shall impose on you."

Contempt - 18 USC § 401

18 U.S.C. § 401 empowers Federal courts

". . . to punish by fine or imprisonment, at its discretion such contempt of its authority, and none others, as —

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; . . ."

The allegedly contemptuous behavior consisted of appellant's "twice refusing to step forward and his willfully remaining slouched in his seat while being personally addressed" by the court. Appellant contends that this behavior did not constitute an actual obstruction to justice and therefore was not contemptuous within the meaning of 18 U.S.C. § 401. *Ex Parte Hudgings*, 249 U.S. 378, 383 (1919). We cannot agree.

It is true that the courts have questioned whether the trial court may require spectators "to perform purely ceremonial or symbolic acts". Where, however, "such an act is accompanied by some disturbance, disorder or interruption, an obstruction may exist." *In re Dellinger*, 461 F.2d 389, 401 (7 Cir. 1972).[2] Here we are concerned with more than merely the observance of the formality of rising at the end of a court session. Appellant defied a clear order directed to him personally by the court. The ability of a trial judge to compel obedience to his orders is fundamental to the proper functioning of our system of justice. Whether a person be directly involved in a judicial proceeding or simply a mere spectator, he is subject to all reasonable orders of the court, even those given at the end of a court session. We conclude that appellant's refusal to step forward combined with his apparent disrespect for the court as manifested by his courtroom demeanor constituted an obstruction to the administration of justice punishable under 18 U.S.C. § 401.

---

[2]See also *United States ex rel. Robson v. Malone*, 412 F.2D 843, 850 (7 Cir. 1969).

Necessity Of A Warning

Appellant contends that the court committed reversible error in failing to warn appellant that he would be held in criminal contempt if he refused to step forward. We cannot agree. Under certain circumstances, this court and other courts have determined that a warning is necessary before a court may impose criminal penalities, *Yates v. United States,* 227 F.2d 848, 851 (9 Cir. 1955) and *Daschbach v. United States,* 254 F.2d 687, 692 (9 Cir. 1958), or deprive a person of his constitutional rights, *Illinois v. Allen,* 397 U.S. 337, 350 (1970) (Brennan, J., concurring). Those cases, however, are factually distinguishable.[3] We have not been cited nor have we found a case which, under circumstances like these, would require a court to give a warning before citing a person for criminal contempt. Although we consider that a warning would have been appropriate,[4] we cannot hold that the failure to warn constituted a reversible error.

---

[3]In both *Yates* and *Dashbach,* this court held that witnesses, who had been held in civil contempt for refusing to answer questions at the command of the court, could not later be subjected to criminal contempt sanctions unless they had been warned that criminal penalties in addition to the civil contempt measures might be imposed for their failure to answer. In *Illinois v. Allen,* the Court was not concerned with a contempt charge but rather with the removal of a disruptive defendant from the courtroom.

[4]The ABA Standards for Criminal Justice, Function of the Trial Judge Sec. 712 states:

> "No sanction other than censure should be imposed by the trial judge unless
>
> (i) it is clear from the identity of the offender and the character of his acts that disruptive conduct was willfully contemptuous, or
>
> (ii) *the conduct warranting the sanction was preceded by a clear warning that the conduct is impermissible and that specified sanctions may be imposed for its repetitions."* (Emphasis added).

The ABA Advisory Committee on the Judge's Function in its commentary on this standard stated in relevant part:

> "A prior warning is desirable before punishing all but flagrant contempts. A warning may be effective in preventing further disorder and is therefore preferable to sanctions as a first step. It also assures both the court and the public that subsequent misconduct will be willfully contemputous and deserving of punishment."

Applicability Of Rule 42(a)

Rule 42 of the Federal Rules of Criminal Procedure prescribes the procedures to be followed in dealing with criminal contempt. Subdivison (a) provides for summary disposition[5] and subdivision (b) for the disposition upon notice and hearing.[6] Here the district court summarily punished appellant pursuant to 42(a).

42(b) provides the "normal procedure" for adjudicating contempt. *Harris v. United States,* 382 U.S. 162, 165 (1965). Because the Due Process requirements of notice and hearing need not be observed in punishing contempt under 42(a), its application is "narrowly limited". *In re Oliver,* 333 U.S. 257, 275 (1948).[7] In *Harris, supra,* at 164, the Court stated;

> "Rule 42(a) was reserved 'for exceptional circumstances,' *Brown v. United States,* 359 U.S. 41, 54

---

[5]Rule 42(a) provides:

"A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

[6]Rule 42(b) provides in pertinent part:

"A criminal contempt except as provided in subdivision (a) of this rule shall be prosec[illegible] on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and described it as such."

[7]The ABA Standards for Criminal Justice, Function of the Trial Judge, Sec. 7.4 states that "Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment". The Advisory Committee's commentary on this section states in relevant part:

> "Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, *Ex parte Terry,* 128 U.S. 289 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness, and is likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course."

(dissenting opinion), such as acts threatening the judge or disrupting a hearing or obstructing court proceedings. *Ibid.* We reach that conclusion in light of 'the concern long demonstrated by both Congress and this Court over the possible abuse of the contempt power,' *ibid.*, and in light of the wording of the Rule. Summary contempt is for 'misbehavior' *(Ex parte Terry,* 128 U.S. 289, 314) in the 'actual presence of the court.' Then speedy punishment may be necessary in order to achieve 'summary vindication of the court's dignity and authority.' *Cooke v. United States,* 267 U.S. 517, 534."

The Court has consistently stressed that the "need for immediate penal vindication of the dignity of the court" is the basis for Rule 42(a). *Cooke, supra* at 536.[8] Even though the "misconduct [occurs] in open court, in the presence of the judge, [and] disturbs the court's business" and "all of the essential elements of the misconduct are under the eye of the court" and "are actually observed by the court", it must appear also that "immediate punishment is essential to prevent 'demoralization of the court's authority' before the public". *In re Oliver, supra* at 275.

While the appellant's refusal to step forward when ordered by the judge may have been contemptuous, it does not appear that it was necessary for the court order immediate incarceration. The Supreme Court has consistently held that "the limits of the power to punish for contempt are '[t]he least possible power adequate to the end proposed' ". *Harris, supra* at 165. Appellant's misbehavior occurred after court had been recessed and while the judge was leaving the

---

[8]As stated in *Cooke, supra* at 536 with respect to summary contempt procedures:

> "Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; but the need for immediate penal vindication of the dignity of the court created it".

bench. Less drastic alternatives were available. If the judge deemed punishment by imprisonment necessary, the procedure outlined in Rule 42(b) should have been followed.[9]

Appellee contends that this case is controlled by *Comstock v. United States*, 419 F.2d 1128 (9 Cir. 1969) wherein this court upheld a contempt conviction pursuant to Rule 42(a). In our opinion *Comstock* is factually distinguishable. There the defendant refused to rise when the adjournment of the court was announced. "He was admonished to rise. He refused. He was directed by the judge to approach the bench. He refused. When the Marshal took him by the arm and forcibly led him to the bench he went limp and as court addressed him lay prostrate on the floor. At a subsequent court session the judge sentenced him to 15 days for contempt of court." *Id.* at 1134. In *Comstock* the party charged with contempt was the defendant in the proceeding and his disobedience of the court command was followed by an actual disturbance in the courtroom. Here, the appellant was not directly involved in the proceeding and there was no disturbance of the nature involved in *Comstock*.

Punishment

Assuming arguendo, that the appellant's conduct justified summary punishment pursuant to Rule 42(a), in our opinion the sentence imposed was excessive. Courts have discretion in punishing contemptuous conduct; but as the Supreme Court has stated:

> "The 'discretion' to punish vested in the District Courts by § 401 is not an unbridled discretion. Appellate

---

[9]The brief hearing following the initial incarceration of the appellant does not render what would otherwise be an improper exercise of the summary contempt powers constitutionally permissible. A reading of the transcript of the hearing indicates that the purpose of the hearing was simply to impose sentence. Appellant's guilt had already been determined.

courts have here a special responsibility for determining that the power is not abused, to be exercised if necessary by revising themselves the sentences imposed. This Court has in past cases taken pains to emphasize its concern with the use to which the sentencing power has occasionally been put, both by remanding for reconsideration of contempt sentences in light of factors it deemed important, . . . and by itself modifying such sentences." *Green v. United States*, 356 U.S. 165, 188 (1958).

See U.S. v. United Mine Workers, 330 U.S. 258, 302-306 (1947).

In *Robson v. Malone, supra* the court vacated a sentence imposed on two spectators who failed to rise when ordered to do so by the bailiff at the beginning and end of a court session. A sentence of thirty days had been imposed on one spectator and a sentence of ten days on the other. In vacating the sentences, the court noted that the failure to rise was not accompanied by any other disturbance in the courtroom. Stressing that the "contempt power is to be limited to 'the least possible power adequate to the end proposed'" the court concluded:

> "Our careful evaluation of the record convinces us that due enforcement of the court's requirement that all rise required no more in these particular circumstances than was accomplished by the exclusion of appellants from the court room, and their being held in custody for four hours and two and one-half hours respectively." 412 F.2d at 850-851.

Here, as in *Robson*, no other disturbance accompanied appellant's refusal to step forward. Under these circumstances we conclude that the ninety day sentence was excessive. Appellant has already served two weeks of the

sentence. [10] Due enforcement of the requirement that the trial judge's orders be obeyed has been accomplished by the time that the appellant has already served.

In summary we conclude that (1) appellant's misbehavior was contemptuous and punishable under 18 U.S.C., § 401; but (2) did not constitute "exceptional circumstances" requiring "immediate penal vindication of the dignity of the court" pursuant to Rule 42(a); and (3) the remainder of the sentence of imprisonment should be vacated.

Remanded for vacation of remainder of sentence.

WALLACE, Circuit Judge, Concurring:

I concur with the majority except for the last section of the opinion entitled "Punishment" and the vacation of the remainder of the sentence imposed. The district court should be left free to hold a hearing pursuant to Rule 42(b). If it does so, a new penalty may be imposed. Such a hearing may produce evidence which would be relevant to whether the imposition of a new contempt sentence requires modification. I cannot make that judgment before the Rule 42(b) hearing. Therefore, I would reverse merely on the basis that the district court proceeded upon Rule 42(a) instead of Rule 42(b).

---

[10] The district court denied motions for a stay pending appeal and for release on Bail. On July 1, 1974 this court granted appellant's application for release on bail.

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 74-2227

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MANUEL GLENN ABASCAL,

Defendant-Appellant.

[February 27, 1975]

ORDER

Before: KOELSCH and WALLACE, Circuit Judges and JAMESON,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

---

*Honorable W.J. Jameson, United States Senior District Judge for the District of Montana, sitting by designation.

Appendix D

United States Court of Appeals
for the Ninth Circuit

No. 74-2227
D.C. No. Cr 14829

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VS

MANUEL GLENN ABASCAL,
Defendant-Appellant.

ORDER STAYING ISSUANCE OF MANDATE

Upon application of HOWARD MOORE, Jr., ESQ. counsel for the appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before March 26, 1975.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

[Filed March 14, 1975]

KOELSCH
U.S. Circuit Judge

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1234

MANUEL GLENN ABASCAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he should have been warned before being held in contempt, that this conduct was not contemptuous, and that the use of summary contempt was inappropriate.

1. By an indictment returned in the United States District Court for the Southern District of California, petitioner and eight others were charged, in various combinations, with conspiracy to import and possess controlled substances with the intent to distribute them, in violation of 21 U.S.C. 841, 846, 952, 960, and 963. On June 20, 1974, petitioner and his counsel came to the courthouse to examine records in connection with a motion on petitioner's behalf. While his attorney was examining the records in the clerk's office, petitioner attended a hearing on a motion filed by one of his co-defendants. Petitioner was not a party to the hearing, and his presence was not required.

When the court recessed at about 10:45 a.m. and the clerk ordered everyone to rise, petitioner remained seated. Noting petitioner's presence and failure to rise, the presiding judge had his secretary prepare a statement, which the judge intended to read to petitioner (T. 3).[1]

Petitioner was not present when the court reconvened at about 11:00 a.m., but he subsequently entered the courtroom. At the noon recess, as the judge stood to leave the bench, the clerk ordered everyone to rise. After the judge paused to answer a question by counsel for petitioner's co-defendant, the clerk again ordered everyone to rise. All except petitioner rose (T. 3-4). The following colloquy then occurred (Pet. App. A, p. A-2; T. 4):

THE COURT:	Mr. Abascal, would you step forward, please?
DEFENDANT ABASCAL:	(No response).
THE COURT:	Step forward, please.
DEFENDANT ABASCAL:	Not without my counsel, sir.

---

[1]The statement read (T. 5):

> Mr. Abascal, it concerns me not whether you have any respect for me personally. However, I do demand respect for this Court. I suggest that if you entertain any thoughts of becoming an attorney, you conduct yourself accordingly while in the courtroom. This includes standing during the opening and closing of each Court session. Your continued failure to do so will result in this Court's order that except during the hearings involving yourself, you will absent yourself from the Courtroom along with such other sanctions as this Court shall impose on you.

"T." refers to the reporter's partial transcript of the proceedings on June 20, 1974.

THE COURT: Mr. Cecil, he's in contempt of court. I've told him to step forward. He has refused to get out of his seat. Put him in jail.

Petitioner was then taken into custody.

A few hours later petitioner and his counsel appeared before the court. The judge stated that he had asked petitioner to step forward in order to read a statement to him (T. 4-5). Before he imposed sentence, the judge allowed petitioner to speak on his own behalf. Petitioner stated (T. 9):

> I'd like to address the Court and state that, as an institution, I meant no disrespect to the Court and that I required or requested for my fundamental legal right that my counsel be present before I be brought up in front of the Court.

The court then sentenced petitioner to imprisonment for 90 days and denied his motions for a stay pending appeal and for release on bail (T. 10-12).

On June 24, 1974, the court filed a Certificate of Contempt in which it characterized petitioner's refusal to step forward as insolent and ruled that petitioner's conduct was a direct affront to the dignity of the court, in violation of 18 U.S.C. 401. The certificate stated: "[I]f this court cannot require those who are in its courtroom to obey the court, then this court would lose any control it has over its own court and courtroom" (Pet. App. A, p. A-1).

On July 1, 1974, the court of appeals granted petitioner's application for bail. On January 9, 1975, it affirmed petitioner's conviction but vacated (as excessive) the remainder of his sentence (Pet. App. B; 509 F.2d 752).

2. Petitioner contends that, because the district court should not have summarily held him in contempt, his conviction should have been reversed (Pet. 22-23). The court of appeals agreed with petitioner's argument that his actions were punishable, if at all, only under the notice and hearing provision of Fed. R. Crim. P. 42(b) rather than the summary contempt procedures of Rule 42(a) (Pet. App. B, pp. A-11 to A-13). Instead of reversing his conviction and remanding for a new hearing, however, the court of appeals simply vacated the remainder of his sentence (Pet. App. B, pp. A-12 to A-13). Petitioner contends that this was improper and that, once the court of appeals concluded that his conviction was erroneous, it had no alternative but to reverse.

However, the court of appeals' conclusion about Rule 42(b) was incorrect, and petitioner's contention thus fails. Petitioner's conduct, if contemptuous, fell squarely within the terms of Rule 42(a) because it was committed "in the actual presence of the court." As this Court has recently held in *United States* v. *Wilson*, No. 73-1162, decided May 19, 1975, a contempt committed in the physical presence of the court may be punished summarily in accordance with the terms of Rule 42(a). We submit that *Wilson* is dispositive of this portion of petitioner's argument, and that his conviction was not defective because imposed pursuant to Rule 42(a).

3. Petitioner argues that it was improper to hold him in contempt because less severe alternatives, including a warning, should have been employed by the district court, because his failure to rise and step forward did not interrupt an ongoing judicial proceeding but occurred during a recess, and because, although his failure to rise and step forward may have been an affront to the dignity of the judge, it was not an obstruction of the

judicial process. We recognize that the cumulation of these contentions, although not necessarily any one of them singly, raises questions about the propriety of petitioner's citation for contempt.[2]

On several occasions this Court has held that the contempt power should be exercised sparingly and only as a last resort. "Summary punishment always, and rightly, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes." *Sacher* v. *United States*, 343 U.S. 1, 8; cf. *Bitter* v. *United States*, 389 U.S. 15, 16. This theme was reiterated in *Wilson*: "[O]nly 'the least possible power adequate to the end proposed' should be used in contempt cases" (slip op. at 10, quoting from *Anderson* v. *Dunn*, 6 Wheat. 204, 231).

We do not doubt that there are many cases in which a face-to-face refusal to comply with a court's order to step forward will disrupt or frustrate an ongoing proceeding. So, too, we think it clear that in many cases of that sort an immediate citation for contempt would be entirely appropriate. The propriety of its use in this case, however, is uncertain. Petitioner explained, when he was brought before the court after he had been held in con-

---

[2]Citing *United States* v. *Snider*, 502 F.2d 645 (C.A. 4), and *In re Dellinger*, 461 F.2d 389 (C.A. 7), petitioner contends that this Court should resolve the conflict among the circuits concerning the authority of a trial judge to punish a defendant's failure to rise at the opening and closing of a session of court. It is unnecessary to resolve that conflict in this case; petitioner was cited not only for his refusal to rise ceremonially, but also for his refusal to step forward to be addressed by the judge, a refusal that, ironically, prevented the judge from reading to him the full warning that had been prepared. Neither *Snider* nor *Dellinger* involved such additional circumstance.

tempt, that he declined to step forward because he was without his attorney, and that he meant no disrespect for the court. This is not, of course, a legitimate reason for failing to obey the court's order, nor does petitioner now contend that it was. But it may suggest that, if the district court had warned petitioner that the court considered his refusal to step forward contemptuous and informed him that he was not entitled to seek the advice of counsel before complying, there was some possibility that petitioner would have obeyed, and the need for his incarceration could have been averted.

4. We submit that it is unnecessary, however, for this Court to decide whether the contempt citation in this case was proper. As a result of the decision of the court of appeals, petitioner already has served all of his sentence. This Court has held (*St. Pierre* v. *United States*, 319 U.S. 41) that a case becomes moot when a contemnor completes his sentence. Since *St. Pierre* was decided, its scope has been narrowed by *Sibron* v. *New York*, 392 U.S. 40. *Sibron* held that, in the event of a conviction for a felony, a case is not moot unless the government can establish that there is "no possibility" that any collateral consequences "will be imposed on the basis of the challenged conviction" (392 U.S. at 57).

In the instant case, although we cannot say with absolute certainty that no collateral consequences attend petitioner's citation for contempt, we submit that there is no reasonable possibility of collateral consequences. Contempt is not a "felony," and laws imposing civil disabilities upon felons (as was the case in *Sibron*) rarely, if ever, impose such disabilities upon contemnors. More-

over, petitioner now has been convicted of the drug offenses and sentenced to a term of nine years' imprisonment. In light of this sentence, adverse collateral consequences will obtain whether or not petitioner's citation for contempt stands, and we know of no collateral consequence that will be created or augmented by the citation.[3] Under these circumstances, we submit, this case is moot, and certiorari should be denied for that reason.

5. Even if the case were not regarded as moot, we believe there is little to be gained by review by this Court. This case, like most contempt cases, turns on its particular (and somewhat unusual) facts. Plenary review by this Court would likely be of little value in elucidating the applicable legal principles, particularly in light of their recent reiteration by this Court in *Wilson*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

---

[3]Petitioner's conviction is now on appeal to the Court of Appeals for the Ninth Circuit. We do not believe that it is likely to be reversed; if it is reversed, and if, thereafter, collateral consequences are imposed upon petitioner solely as a result of the citation for contempt, petitioner could seek a writ in the nature of *coram nobis*. If the present petition is denied on mootness grounds, we would consent to the disposition of such an application on its merits and would not argue preclusion by virtue of the previous litigation of the same issue.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1234

UNITED STATES OF AMERICA,
Respondent-Appellee,

v.

MANUEL GLENN ABASCAL,
Petitioner-Appellant.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner's Reply to the Memorandum in Opposition

The respondent recognizes that there is merit to the claims advanced in the petition for writ of certiorari. The respondent agrees that a warning would have been proper, and acknowledges the propriety of the use of the summary contempt power in this case "is uncertain" (Memorandum, at 5). However, the respondent urges this Court not to grant the petition for writ of certiorari, because as a result of the decision of the Ninth Circuit petitioner has served his sentence and the case has, thus, become moot (*Ibid,* at 6).

The decision of the Ninth Circuit did *not* render this case moot. Petitioner can show that under California law "further penalties or disabilities can be imposed on him as result of the judgment which has now been satisfied". *St. Pierre v. United States,* 319 U.S. 41, 43(1943).

The contempt conviction could render petitioner ineligible for admission to practice law as an attorney at law in California. Petitioner is a student in good standing at the New College of California School of Law in San Francisco. The petitioner has taken and successfully passed the First Year Law School Examination, commonly known as the "Baby Bar". (See Appendix "A" to this reply). Success on the "Baby Bar" is required by California law as a condition precedent to continued law study and admission to the State Bar of California by a student attending a school which has not been accredited by the examining committee. California Business and Professions Code, §6060(4) (g).

Petitioner's conviction for contempt would constitute evidence of his violation of the duty imposed upon attorneys under California Business and Professions Code, §6068(f) to refrain from any "offensive personality" towards the court. Exhibition of "offensive personality" is recognized as grounds for suspension from the practice of law. *In re Philbrook,* 105 C. 471, 38 P. 511 (1895); and *Hogan v. State Bar,* 36 C. 2d 807, 228 P. 2d 554 (1951). In a challenge to petitioner's application for admission to practice law based upon his contempt conviction, petitioner would have the burden of establishing his "good character". See *7 Cal Jur 3d,* "Attorneys At Law", §44, 301. Evidence which supports imposition of discipline may be equally used to prevent admission to the State Bar. *Ibid,* §43, 299. However, a favorable termination of criminal proceedings "is entitled to very serious consideration in any subsequent proceedings" involving an application for admission to the State Bar. See *Siegel v. Committee of Bar Examiners,* 10 C. 3d 156, 178, 514 P. 2d 967 (1973).

The fact that petitioner is preparing himself to practice law already appears in the record of this case. (See note 1, Memorandum, at 2).

The possibility that petitioner's contempt conviction might someday be counted against him in his quest for admission to practice law, even if a remote one, "is enough to give this case an adversary cast and make it justiciable". *Benton v. Maryland* 395 U.S. 784, 791 (1969). Application of the collateral consequences doctrine enabled this Court to find that the case was not moot in *Sibron v. New York,* 392 U.S. 40, 55, 56 (1968). There the judgment of conviction could have been used to impeach Sibron should he be called as a witness or used to augment punishment upon a conviction of a crime in the future. In *Ginsberg v. New York,* 390 U.S. 629, 633 n2 (1968), the case was not moot, because the "conviction might result in the revocation of the license required by municipal law as a prerequisite to engaging in the luncheonette business. . ." and, in *Street v. New York,* 394 U.S. 576, 579 n3(1969), the case was not moot, because Street might have been temporarily deprived of his employment, if his conviction had not been reviewed and reversed. Thus, this case is ripe for review now.

Still another reason why this case is not moot, and a reason recognized as an exception to the completed sentence doctrine by this Court in *St. Pierre v. United States, supra,* is: the petitioner could not have brought his case before this Court prior to the entry of the order of the Ninth Circuit reducing his sentence from 90 days to time served. Petitioner did everything in his power and in a timely manner to perfect his appeal and preserve the opportunity to have his claims reviewed. When the trial judge refused to admit petitioner to bail pending appeal of his contempt conviction, petitioner secured an order from the Ninth Circuit admitting him to bail and thereby staying service of the sentence. When the Ninth Circuit affirmed petitioner's conviction and reduced his sentence to time served, petitioner filed a timely petition for rehearing. When the Ninth Circuit denied the petition for rehearing, the petitioner obtained a stay of the mandate so that he could bring his case before this court for review (Appendix D, to petition). A federal

Circuit Court of Appeals, even less than a state court, may not fashion its remedy in such manner that the Government may argue petitioner's case has become moot merely because he could not bring it before this Court prior to a decision of the Ninth Circuit, which alone prevents review in this Court prior to the completion of Petitioner's sentence. See *Sibron v. New York, supra,* at 53.

The respondent argues that "petitioner has now been convicted of the drug offenses and sentenced to a term of nine years' imprisonment" and, thus, "adverse collateral consequences will obtain regardless of whether or not petitioner's citation for contempt stands . . ." (Memorandum, at 7). The respondent overlooks the fact that the validity of petitioner's conviction is much in doubt. See *Benton v. Maryland, supra,* at 793. The Ninth Circuit has twice recognized that the issues to be decided on petitioner's appeal to that court are substantial. On January 17, 1975, the Ninth Circuit vacated an order of the trial judge, setting exhorbitant bail as a condition for petitioner's release pending appeal, and remanded with directions. On February 26, 1975, the Ninth Circuit acted decisively and ordered petitioner's bail reduced to a reasonable amount. Thus, whether or not the petitioner will ever be committed under the sentence for the substantive offenses is very much unsettled and in doubt.

Finally, the respondent urges that if petitioner prevails in his appeal and adverse "collateral consequences are imposed" it would not oppose litigation of the issues in a petition for writ of *coram nobis* (Memorandum, at 7 n3). The respondent's offer should be rejected out of hand, for as this Court stated in *Sibron v. New York, supra,* at 56,57:

> "The question of the validity of a criminal conviction can arise in many contexts, . . . and the sooner the issue is fully litigated the better for all concerned. It is always preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy."

The recent decision of this Court in *United States v. Wilson,* No. 73-1162, 43 LW 4584 (May 19, 1975), in which this Court upheld the imposition of summary contempt under Rule 42 (1), 18 United States Code, against a trial witness, makes it imperative that this Court grant certiorari. A decision by this Court that a warning is required will serve to continue to restrict the exercise of the summary contempt power to "the least possible power adequate to the end proposed". *Anderson v. Dunn,* 6 Wheat. 204, 231 (1821).

Respectfully submitted,

HOWARD MOORE, JR.
COLE A. POWELL
1880 San Pedro
Berkeley, California 94707
415/527-7656

Attorneys for Petitioner

June 9, 1975

APPENDIX

APPENDIX A

THE COMMITTEE OF BAR EXAMINERS

OF THE STATE BAR OF CALIFORNIA

Samuel I. Williams, Chairman
LOS ANGELES
Milton L. Schwartz, Vice-Chairman
SACRAMENTO
Rita Bosio Aguilar
SAN JOSE
Victor E. Chavez
LOS ANGELES
Raymond G. Lamb
FRESNO
David E. Nelson
SAN FRANCISCO
John P. O'Hara
LOS ANGELES
David I. Weber
OAKLAND

540 VAN NESS AVENUE
SAN FRANCISCO 94102
Telephone (415) 626-9950

1230 WEST THIRD STREET
LOS ANGELES 90017
Telephone (213) 482-4040

Kenneth D. McCleskey, Administrator
James A. Greenebaum, Consultant
Blaine S. Stephens, Asst. Admin.-Exams
Leslie Barnes, Asst. Administrator
SAN FRANCISCO

August 23, 1974

TO: SUCCESSFUL APPLICANTS
1974 FIRST-YEAR LAW STUDENTS' EXAMINATION

We are pleased to inform you that you passed the June, 1974 First-Year Law Students' Examination with the grade indicated on the enclosed card.

You are now entitled to credit for no more than one year of law study accomplished before June 4, 1974 unless, upon petition and for good cause, the Committee decides that you are entitled to additional credit. Please see Rule VI, Section 61 of the Rules Regulating Admission to Practice Law in California (hereafter termed 'Rules') regarding such petitions.

Before you will be eligible to take the final bar examination, you must complete the legal education requirements, as set forth in Rule IX, Section 91 of the Rules. Unless you petition for and are granted additional credit by the Committee, you must, after June 4, 1974, complete three more years of law study as such law study is defined in Section 91, except that, if you are a student in an accredited law school and intend to qualify for the final bar examination by graduation therefrom, you may be able to do so after two and one-half years of additional study if your total studies include at least one year of full-time study or after two more years of full-time study if you have already completed one year of full-time study in such a school.

Your attention is also called to Rule VII, Section 71 of the Rules, regarding the application that you must file before you may take the final bar examination and the time within which you must file it.

For the Committee of Bar Examiners,

Kenneth D. McCleskey
Administrator

KDM:km
Enclosure

Keys to Grades: A - Excellent
B - Good
C - Fair
D - Barely Passed: Considerable improvement in rate of progress will have to be shown to pass bar examination.